IRMS / ICT Symposium

May 5, 2022

Workers' Compensation Case Legal Update

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Presenter

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Illinois Health and Hospital Association

I. The Evolution of the COVID-19 Legislation in Illinois Workers' Compensation and Practical Considerations Moving Forward.

Illinois Workers' Compensation COVID-19 Rebuttable Presumption Timeline

April 13, 2020- Commission adopts Emergency Rule regarding a rebuttable presumption for COVID -19 claims.

April 15, 2020- Commission amends 4/13 Emergency Rule expanding the scope of impact to employees working for essential businesses as provided in the Governor's Executive Order 2020-10.

April 22, 2020- Temporary Restraining Order filed to block Emergency Rule.

April 23, 2020- Court Enjoins Enforcement of Commission's Emergency Rule.

April 27, 2020- Commission Repeals Emergency Rule on COVID-19.

May 15, 2020- Agreed bill negotiations begin.

May 22, 2020- Both Houses approve HB 2455

June 5, 2020- Governor signs HB 2455 into law as PA 101-633

Occupational Diseases Act

The Occupational Diseases Act defines what is meant by an "occupational disease" as follows:

- In the Act the term "Occupational Disease" means a disease arising out of and in the course of the employment or which has become aggravated and rendered disabling as a result of the exposure of the employment. Such aggravation shall arise out of a risk peculiar to or increased by the employment and not common to the general public. A disease shall be deemed to arise out of the employment if there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is performed and the occupational disease. The disease need not to have been foreseen or expected but after its contraction it must appear to have had its origin or aggravation in a risk connected with the employment and to have flowed from that source as a rational consequence.
- The Act states than an employee "Shall be conclusively deemed to have been exposed to the hazards of an occupational disease when, for any length of time however, short, he or she is employed in an occupation or process in which the hazard of the disease exists. Section 1(d).

PA 101 - 633

Amends Section 1 of the Illinois Occupational Diseases Act by adding paragraph (g):
Par. 1 In any proceeding before the Commission in which the employee is a COVID-19 first responder or front-line worker as defined in Section (g)(2), if the employee's injury or occupational disease resulted from exposure to and contraction of the COVID-19 virus, the exposure and contraction shall be rebuttably presumed to have arisen out of and in the course of the employee's first-responder or front-line worker employment and the injury or occupational disease shall be rebuttably presumed to be causally connected to the hazards or exposures of the employee's first-responder or front-line worker employment.

Covered Employees

Par. 2 The term "COVID-19 first-responder or front-line worker" means : all individuals employed as police, fire personnel, emergency medical technicians, or paramedics; all individuals employed and considered as first-responders; all workers for health care providers, including nursing homes and rehabilitation facilities and homecare workers; corrections officers; and any individuals employed by essential businesses and operations as defined in Executive Order 2020-10 dated March 20, 2020, as long as individuals employed by essential businesses and operations are required by their employment to encounter members of the general public or to work in employment locations of more than 15 employees. For purposes of this section only, an employee's home or place of residence is not a place of employment, except for homecare workers.

Essential Businesses

As defined by Executive Order 2020-10 essential employees work in:

Stores that sell groceries/medicine.

Food, beverage and cannabis production/agriculture.

Organizations that provide charitable and social services.

Gas stations and businesses necessary for transportation.

Financial Institutions (Banks, currency exchanges & consumer lenders).

Hardware and Supply Stores.

Critical trades (building & construction, cleaning/janitorial, security and other service providers). Mail, post, shipping, logistics, delivery and pickup services.

Educational Institutions.

Laundry services.

Essential Businesses (cont'd)

Restaurants for consumption off site.

Businesses that sell, manufacture or supply products to work from home.

Businesses that sell, manufacture or supply other essential businesses/operations. Transportation companies.

Home based care & services.

Residential facilities & shelters.

Professional Services (law firms, accounting firms and insurance agencies).

Daycare Centers for employees exempted by this executive order.

Businesses that manufacture, distribute and are supply chain for critical products in industries.

Critical Labor Union functions; Hotels /Motels;

Funeral services.

Excluded Employees

An employee's home or place of residence is not a place of employment, except for homecare workers.

Employment locations of less then 15 employees.

Rebuttable Presumption

Par. 3 The presumption in Section (g)(1) above may be rebutted by evidence including but not limited to the following:

(A) The employee was working from his or her home, on leave from his or her employment, or some combination thereof, for a period of 14 or more consecutive days immediately prior to the employee's injury, occupational disease, or period of incapacity resulted from exposure to the COVID-19 virus; or

(B) The employer was engaging in and applying to the fullest extent possible or enforcing to the best of its ability industry-specific workplace sanitation, social distancing, and health and safety practices based on updated guidance issued by the Centers for Disease Control or Illinois Department of Public Health or was using a combination of administrative controls, engineering controls, or personnel protective equipment to reduce the transmission of COVID-19 to all employees for at least 14 consecutive days prior to the employee's injury, occupational disease, or period of incapacity resulted from exposure to the COVID19 virus. For purposes of this subsection "updated" means the guidance in effect at least 14 days prior to the COVID-19 diagnosis. For purposes of this subsection, "personal protective equipment" means industry-specific equipment worn to minimize exposure to hazards that cause illnesses or serious injuries, which may result from contact with biological, chemical, radiological, physical, electrical, mechanical, or other workplace hazards. "Personal protective equipment" includes, but is not limited to, items such as face coverings, gloves, safety glasses, safety face shields, barriers, shoes, earplugs or muffs, hard hats, respirators, coveralls, vests, and full body suits.; or

(C) The employee was exposed to the COVID-19 virus by an alternate source.

Rebuttable Presumption

A **rebuttable presumption** may create a prima facie case as to the particular issue in question and thus has the practical effect of requiring the party against whom it operates to come forward with evidence to meet the presumption. However, once evidence opposing the presumption comes into the case, the presumption ceases to operate, and the issue is determined on the basis of the evidence adduced at trial as if no presumption had ever existed. The burden of proof thus does not shift but remains with the party who initially had the benefit of the presumption.

Pursuant to case law, a rebuttable presumption may be overcome by either the ordinary standard (some evidence) or by the strong standard (clear and convincing evidence).

Existing Rebuttable Presumptions in WCA

Section 6(f)

"Any condition or impairment of health of an employee employed as a firefighter, emergency medical technician (EMT), or paramedic which results directly or indirectly from any blood borne pathogen, lung or respiratory disease or condition, heart or vascular disease or condition, hypertension, tuberculosis, or cancer resulting in any disability (temporary, permanent, total, or partial) to the employee shall be rebuttably presumed to arise out of and in the course of the employee's firefighting, EMT, or paramedic employment and, further, shall be rebuttably presumed to be causally connected to the hazards or exposures of the employment. However, this presumption shall not apply to any employee who has been employed as a firefighter, EMT, or paramedic for less than 5 years at the time he or she files an Application for Adjustment of Claim concerning this condition or impairment with the Illinois Workers' Compensation Commission."

Kevin Johnston v. East Dundee FPD

Kevin Johnston v. East Dundee FPD
14WC006647; 15IWCC0393

Provides guidance as to what evidence is required to overcome the rebuttable presumption.

Kevin Johnston v. East Dundee FPD

- Arbitration decision, 19(b)/8(a),
- 42 year old firefighter suffers VF arrest, undergoes quadruple by-pass
- HX of snow-blowing?
- Dr. Berry, Petitioner's cardiologist: "Could have happened at rest"
- Dr. Fintel, Respondent's expert, pre-existing & work not risk factor ("questioned about elements of statutory presumption")

Kevin Johnston v. East Dundee FPD

- The presumption the Arbitrator noted, applies regardless of whether or not the claimant can initially prove that the condition was the direct result of one of the enumerated jobs…the crux of the issue is whether or not Respondent rebutted the presumption in question."
- "Based on the above, and the record taken as a whole, the Arbitrator finds that Respondent successfully rebutted the presumption outlined in 6(f) by showing that Petitioner's pre-existing coronary artery disease alone was the cause of the event…"
- IWCC affirms & adopts; Circuit Court confirms.
- Case is heard by the Appellate Court.

Kevin Johnston v. East Dundee FPD

- Petitioner first asserts IWCC erred in finding the employer had successfully rebutted the presumption found in Section 6(f).
- Petitioner contends that the evidence showing he had other risk factors for developing coronary artery disease was insufficient to rebut the presumption that his coronary artery disease arose out of his employment as a firefighter.
- The prevailing theory regarding presumptions that Illinois follows and *Diederich* speaks about is "Thayer's bursting-bubble hypothesis: once evidence is introduced contrary to the presumption, the bubble bursts and the presumption vanishes."
- Put another way, once evidence has been presented to rebut the presumption, the metaphorical bubble bursts and the trier of fact must then consider the evidence presented in the case as if the presumption had never existed.

Kevin Johnston v. East Dundee FPD

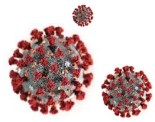
- Because Section 6(f) is silent as to the amount of evidence required to rebut the presumption, the Court engaged in statutory construction to determine whether the rebuttable presumption provided for in section 6(f) falls into the strong or ordinary category, requiring either clear and convincing evidence or merely "some evidence," to the contrary.
- Based on the legislative history, the Court found that Section 6(f) does not involve a strong rebuttable presumption, requiring clear and convincing evidence. Rather, it concluded that the legislature intended an ordinary rebuttable presumption applies, simply requiring the employer to offer *some* evidence sufficient to support a finding that something other than claimant's occupation as a firefighter caused his condition.

Kevin Johnston v. East Dundee FPD

- Nothing indicates the legislature intended that an employer be required to eliminate any occupational exposure as a possible contributing cause of a claimant's condition in order to successfully rebut the presumption.
- If Respondent is successful in rebutting the Section 6(f) presumption, *at that point Petitioner m*ay, if the evidence supports it, assert that his occupational exposure was *a* cause of his condition of ill-being, along the lines of *Sisbro*, thus entitling him to an award of benefits.

PA 101 - 633

- The legislative history of PA 101-633 indicates that the rebuttable presumption in COVID-19 cases is consistent with the rebuttable presumption set forth in *Johnston.*



COVID-19 Rebuttable Presumption Business Legislative Intent Script

Q1: Is it your intent, that regardless of other questions that may be asked, that these questions and answers are designed to provide the legislative intent?

A: Yes.

Q2: Does this legislation create a rebuttable presumption similar to a rebuttable presumption already in the Workers' Compensation Act?

A: Yes.

Q3: Is there a case that addressed the issue of the amount of evidence necessary to rebut a rebuttable presumption already in the Workers' Compensation Act? What "amount of evidence" did that case use to rebut the rebuttable presumption?

A: Yes, there is a case. The Illinois Appellate Court's 2nd District Opinion in Kevin Johnston v. Illinois Workers' Compensation Commission states the "amount of evidence that is required from an adversary to meet the presumption." Par. 39. The Appellate Court said "some evidence sufficient to support a finding that something other than the claimant's occupation …caused his condition" is sufficient to rebut the presumption. Par.45

Q4: Is it your intent to create an ordinary presumption following the contraction of COVID-19 related to one's employment that follows the holding in Johnston case?

A: Yes.

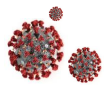
COVID-19 Rebuttable Presumption Business Legislative Intent Script

Q5: Did the Johnston case hold that the rebuttable presumption in question was an ordinary rebuttable presumption? How does an ordinary rebuttable presumption work?

A: Yes, the Johnston case held that the rebuttable presumption was an ordinary rebuttable presumption. The presumption creates a *prima facie* case as to the issue of the injury arising out of the course of employment. Then, to rebut the presumption, the employer must introduce some evidence that claimant's occupation was not the cause of the injury or disease in question. Once the employer introduces some evidence that the employee's occupation was not the cause of the employee's injury or disease, the presumption "ceases to operate, and the issue is determined on the basis of evidence adduced at trial as if no presumption had ever existed. The burden of proof thus does not shift but remains with the party who initially had the benefit of the presumption." Par. 36.

Q6: Regardless of any other response to a question, or statement given today, we need to clarify one specific issue on the intent of this legislation. Is it your intent to follow the holding in the Illinois Appellate Court's 2017 2nd District Decision in Kevin Johnston v. Ill Workers Compensation Commission.

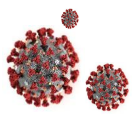
A: Yes.



Effective Date

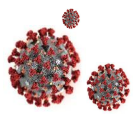
Par. 4 The rebuttable presumption in Section (g)(1) above shall apply to all cases tried after the effective date of this amendment and in which the diagnosis of COVID-19 was made on or after March 9, 2020 and on or before December 31, 2020.

Note: During the General Assembly's Lame Duck Session from January 8-12, 2021 HB 4276 was passed, extending the sunset date for Section 1 (g) from December 31, 2020 to June 30, 2021. The Sunset date has not been extended to cover COVID-19 diagnoses made after June 30, 2021.



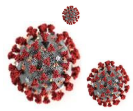
Insurance Experience Rating for Individual Employer Prohibited

Par. 5 Under no circumstances shall any COVID-19 case increase or affect any employer's workers' compensation insurance experience rating or modification but COVID-19 costs may be included in determining overall state loss costs.



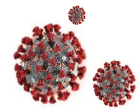
Application of Presumption

Par. 6 In order for the presumption in Section g(1) above to apply at trial, for COVID-19 diagnoses occurring on or before June 15, 2020, an employee must provide a confirmed medical diagnosis by a licensed medical practitioner or a positive laboratory test for COVID-19 or for COVID-19 antibodies; for COVID-19 diagnoses occurring on after June 16, 2020, an employee must provide a positive laboratory test for COVID-19 or for COVID-19 antibodies.



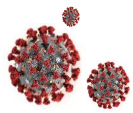
Additional Defense to Presumption

Par. 7 The presumption in Section g(1) above does not apply if the employee's place of employment was solely the employee's home or residence for a period of 14 or more consecutive days immediately prior to the employee's injury, occupational disease, or period of incapacity resulted from exposure to the COVID-19 virus.



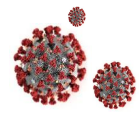
Injury / Exposure Date

Par. 8 The date of injury is either the date that the employee was unable to work due to contraction of COVID-19 or was unable to work due to symptoms that were later diagnosed, whichever came first.



Claim Status if Presumption is Defeated

Par. 9 An employee who has contracted COVID but who fails to establish the rebuttable presumption is not precluded from filing for workers' compensation or occupational disease.

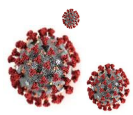


TTD / Credit

Par. 10 To qualify for temporary total disability benefits under the presumption in Section g(1) above, the employee must be certified for or recertified for temporary disability.

➢Off work slips

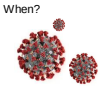
Par. 11 An employer is entitled to a credit against any liability for temporary total disability due to an employee as a result of the employee contracting COVID-19 for (1) any sick leave benefits or extended salary benefits paid to the employee by the employer under Emergency Family Medical Leave Expansion Act, Emergency Paid Sick Leave Act of the Families First Coronavirus Response Act, or any other federal law, or (2) any other credit to which an employer is entitled under the Workers' Compensation Act.



Strategies to Defeat the Presumption

Investigation (Employee Focus)

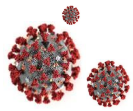
- Recorded statement.
- When notice symptoms.
- Job position and duties (public contact, how often)
- Direct exposure to anyone at work with diagnosis of COVID-19? When?
- On personal time do you, wear gloves, mask etc, social distance, good hygiene, observe govt. recommendations to curb transmission.
- Who live with? Work outside home? Shelter guidelines?
- What do outside of work? Grocery store? Doctor? Other essential business?
- Interact outside of work with anyone who tested positive for COVID-19? Family friends? When?
- Travel? Where, when how? With whom? Issues as noted above.



Strategies to Defeat the Presumption (cont'd)

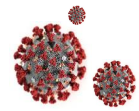
Investigation (Employee Focus)

- Interview manager and co workers.
- Review information from employee.
- Position/title; what's that mean?
- How many other employees working when employee claims exposure? Total employees? Other positive tests? Employee contact?
- Schedule, location.
- Review wage records/timecards.
- Other potential workplace exposures?
- Public interaction? Frequency?
- Safety guidelines – what, when?
- Social distancing in workplace?
- PPE available? When?
- Written guideline? Enforcement?
- Remote work available? Was employee working remotely?
- Know of claimant's outside activities?
- When was illness reported? Source of illness? Mention family members/friends being ill?

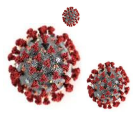


Strategies to Defeat the Presumption (cont'd)

Medical opinion evidence – records review by an infectious disease specialist.

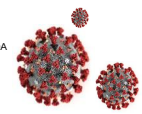


II. COVID-19 Case Law Study.



A. Overview.

- Only two arbitration decisions, no Commission decisions.
- The presumption applied in both cases:
- One case Lucero finds the employer adequately defeated the presumption with evidence or preventative measures.
- The other case Dalton contained substantial testimony from Petitioner of inadequate safety measures, and the testimony on behalf of Respondent did not involve firsthand knowledge.
- Neither case attempted to refute benefits, only focused on accident.
- Both cases were 19(b)'s so no guidance on PPD exposure.
- Given non COVID exposure cases, I assess exposure ranging from 5-103 loss. Obviously, recovery is key.
- Primary focus is on 14 days prior to injury.
- Even if AAC is filed under the WCA, the Arbitrator can *sua sponte* treat the claim as an ODA claim if the parties treat it as such.



B. Case Law Study #1.

Edgar Lucero v. Focal Point LLC

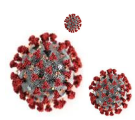
20 WC 08985

Arbitrator Amarillo

Trial: 7/20/21

Decision: 10/21/21

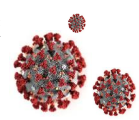
Holding: Respondent overcame the rebuttal presumption, Petitioner still met his burden of proving that he more likely than not contracted COVID-19 at work.



Facts:

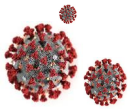
Petitioner was a 51-year old machine operator at a lighting manufacturing company.

- Petitioner denied having any COVID-19 symptoms as of March 21, 2020
- Petitioner lived in a two-flat with his wife, occupying the first floor, and his adult children occupied the second floor with a separate entrance. He noted limited interactions with his children due to the separate residences, and him working the night shift.
- Both children continued working, but neither showed any symptoms of tested positive for COVID prior to Petitioner's illness.
- Other than going to work, Petitioner only stopped for gasoline and paid at the pump; "There was really nowhere else to go" and his life revolved around work and home.
- Petitioner's work station was in proximity to the manual punch clocks.
- Petitioner was aware that some co-workers contracted COVID after the March 21, 2020 executive order, but before he became ill. The week before he became ill, he attended an in-person meeting indoors with about 25 employees around 4/7/20. Only half of the employees were wearing masks.



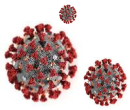
Facts: continued

- Petitioner first noticed symptoms on 4/13/20; this was the last day he worked. He got a test 4/18/20., which was negative. By 4/20/20 , his condition worsened to the point to where he nearly lost consciousness and was taken to the ER. He was intubated on 4/22/20. He was admitted to the hospital until he was discharged on 6/23/20. He was authorized to work after discharged as he required supplemental oxygen 24 hours per day.
- He gradually weaned off oxygen.
- On 3/10/21, he was released to return to work without restrictions. He continued to use supplemental oxygen while sleeping. The arbitrator observed some difficulties breathing during the hearing.
- Respondent's Director of HR testified that Respondent implemented polices on 3/11/20 including encouraging to maintain 3 feet of separation between employees, adding handwash stations and hand sanitizer, conducting virtual meetings.
- Masks were encouraged but not mandated until 4/7/20 when they could physically provide a mask to each employee.



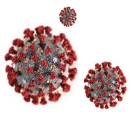
Facts: continued

- They also implemented work from home mandates for some office workers, additional cleaning protocols and removing communal kitchenware.
- Respondent ran contact tracing through questionnaires and did not find any evidence of interaction between the building's first positive case and Petitioner.
- Respondent conducted on-site testing which revealed that the company's positivity rate was lower than the geographic location where they and Petitioner both resided.
- On cross-examination, the Director admitted that another employee on the second shift tested positive two days before Petitioner tested positive, and would have been walking to and from the time clock near Petitioner's workstation.
- Respondent asserted that the meeting around 4/7/20 was conducted in the Respondent's parking garage, and not indoors.

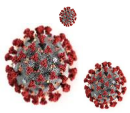


Findings/Procedure:

- Matter was brought pursuant to Sections 19(b) and 8(a).
- Although the AAC was filed under the Workers' Compensation Act, and not the Occupational Disease Act, the parties treated the claim as an exposure and Respondent defended the claim in that manner. The Commission may consider a new theory of recovery *sua sponte* even if it was not presented to the arbitrator and the Petitioner did not amend his AAC. Respondent was aware Petitioner was pursuing a COVID claim, and Respondent had all the information available to defend the claim.
- Petitioner's testimony was credible. He contracted COVID on or before 4/13/20.
- Respondent was an essential business under the Executive Order as it continued to operate after the other business shutdowns.
- The COVID presumption enacted on 6/5/20 applied retroactively to workers who contracted COVID after 3/9/20. For cases on or before 6/15/20, a worker must provide either a diagnosis confirmed by a licensed medical practitioner or a positive laboratory test.
- The presumption is an ordinary presumption: the employer need only introduce "some evidence" that the occupation was not the cause of the injury. Once the employer offers "some evidence sufficient to support a finding that something other than the occupation caused the condition", the presumption ceases to operate and the issue is determined on the basis of evidence admitted at trial as if the presumption never existed. The presumption merely shifts the burden of production, and note the burden of persuasion.



- **The Arbitrator noted an employer may rebut the presumption by:**
  1. Demonstrating that it complied with recommended CDC or Illinois Public Heath guidelines in **the 14 days prior to the diagnosis** (including sanitation, masks, other protective gear, barriers, social distancing, etc.);
  2. Presenting some evidence that the claimant contracted the virus somewhere else; or
  3. Showing that the claimant worked from home or was off work in the 14 days prior to diagnosis.
- Once the presumption is rebutted, Petitioner must establish by a preponderance of the evidence that they contracted COVID at work.



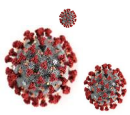
•There was no dispute Petitioner contracted COVID.

•Although masking was recommended, it was not mandated until 4/13/20.

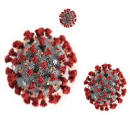
•Social distancing: time clock was close to workstation, plus recommendation was only 3 feet as opposed to 6 feet.

•Testing disregarded as it was implemented after Petitioner tested positive, and arbitrator found assertion that there were no positive tests from the second shift seemed disingenuous.

•Arbitrator also felt some testimony and evidence was self-serving and noted the conflicting evidence regarding the early April meeting.



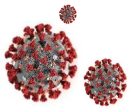
- No evidence of infection of Petitioner's family members or contacts outside work.
- The Arbitrator inferred infection rates for Respondent's workforce given that it was located in the same community and workers were hired from the immediate community.
- Arbitrator concluded that Respondent presented *some* evidence to rebut the presumption.
- Respondent made efforts to implement safety and preventative measures.
- Respondent provided evidence of possible alternative sources via community positivity rates, Petitioner sharing a home with his wife and occasionally seeing his adult children who worked outside the home.
- The Arbitrator found it was more likely than not that Petitioner contracted COVID at work.
- There was evidence that COVID was in the workplace.
- Respondent did not establish an alternative source outside work.
- There was inconsistent testimony and evidence regarding the implementation of preventative measures.



C. Case Law Study #2.

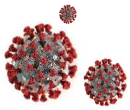
Tonia M Dalton v. Saline Care Nursing & Rehabilitation Center
21 WC 008010
Arbitrator Cantrell
Trial: 8/11/21
Decision: 11/3/21

Holding: Respondent failed to rebut the presumption. Even if Respondent had rebutted the presumption, the Arbitrator still would have found Petitioner proved by an overwhelming preponderance of the evidence that her exposure arose out of and in the course of her employment.



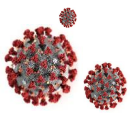
Facts:

- Petitioner was a 50 year old CNA working for Respondent's nursing home for 4 years.
- Tested positive on 11/6/20.
- Petitioner sought treatment on 11/6/20 and received a COVID test that came back positive. A rapid test also tested positive.
- Lived with her fiancé; neither the fiance or any family members tested positive.
- Only went to grocery store and gas station, only spent 30 minutes in grocery store and always wore a mask.
- Never came in contact with anyone outside work who had COVID.
- Did not see her adult children during that time because she worked the night shift and slept during the day, and did not see any of her grandchildren due to concerns of working in a nursing home.



Facts: continued

- Petitioner worked with Billi Headrick 2-3 nights per week, and worked with her on 11/4/20. Both were wearing PPE.
- Billi tested positive for COVID on 11/3/20 and worked with Petitioner on 11/4 and 11/5.
- Respondent was aware Billi tested positive.
- Although employees were supposed to take all meals through the parking lot, many employees went through the COVID wing and many supplies were stored in the COVID wing
- Residents on her wing did not always wear masks.
- Doors to COVID rooms were open.
- Respondent was supposed to have someone at entrances to check vitals, but did not always have someone.
- They entered the wing wearing masks, but needed to put the rest of their PPE inside.
- Masks were defective (had to punch holes in side to tie them)
- Frequently ran out of gloves and sometimes they were too big.
- No soap in machines.
- Did not always have hand sanitizer available.

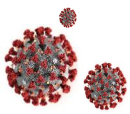


Facts: continued

- High touch surfaces were not disinfected every two hours.
- Tested twice a week, although Petitioner said they did not test her at the beginning of every shift.
- Respondent conducted, and Petitioner attended some in-service training programs from March through September 2020. Petitioner understood the importance of PPE, infection control policies, and complied with them. Although she did not attend all sessions, she was sometimes told to sign acknowledge attendance or receipt of materials to get her paycheck.

Testimony of Respondent's representative, Merle Taylor, Corporate Director of Operations

- Employed by management firm that owns and operates the facility.
- She is a licensed nursing home administrator and worked for skilled nursing facilities for 32 years.
- She prepared the training documents and prepared the policies.
- She provided training documents to the facility administrators who would then disseminate to staff.
- She was not present during training sessions.
- She provided invoices for PPE.
- They were limited by the amount of PPE they could procure, but she never felt facilities had insufficient PPE.
- She visited Respondent's facility periodically but she mostly worked from home.
- She only met with management and administrators and did not meet with CNA's.
- She did not recall when she visited Respondent's facility between March and November 2020.

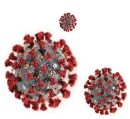


Findings/Procedure:

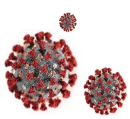
- Similar to *Lucero*, the AAC was filed under the WC. The parties treated it as an exposure claim under the ODA.
- Undisputed Petitioner contracted COVID on 11/6/20 which is when her symptoms began.
- Petitioner was a COVID-19 first responder or front-line worker" as she was employed as a CNA/healthcare provider at a long-term care nursing home.

Rebutting the presumption:

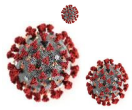
- Ordinary presumption.
- Respondent only needs to provide "some evidence" and then presumption ceases to exist.
- Once rebutted, presumption ceases to exist, and Petitioner must establish COVID was contracted at work by preponderance of evidence.
- Shifts burden to Petitioner.



- No evidence Petitioner worked from home 14 days prior to injury.
- No evidence of outside exposure or alternative source:
- Respondent did not provide "some evidence" of preventative actions within 14 days prior to the injury
- "No evidence admitted at trial that the specific nursing home facility in which Petitioner worked was engaged in or applied to the fullest extent possible, or enforced to the best of its ability industry-specific workplace sanitation, social distancing, and health and safety practices to reduce the transmission of COVID-19 to all employees for at least 1 4 consecutive days prior to 11/6/20.
- Further, there was no evidence admitted at arbitration that Respondent was using a combination of administrative controls or PPE to reduce the transmission of COVID-19 to all employees for at least 1 4 consecutive days prior to 11/6/20.
- Although Ms. Taylor disseminated training documents to administrators, Arbitrator cannot infer that policies were actually disseminated to, and followed by, staff.
- No testimony from managers re efforts to reduce transmission.
- Ms. Taylor did not visit site so no first hand knowledge.
- Evidence that Petitioner and Billi did not receive or complete some of the training.



- No evidence regarding guidance from CDC or IDPH introduced at trial.
- Evidence "strongly supports" that Respondent failed to provide sanitation and PPE (masks defective, short on gloves, not enough soap or hand sanitizer, surfaces not disinfected every two hours.
- Medical records support causation, no evidence offered to rebut opinions and statements of treaters.
- Presumption not rebutted.
- Causation addressed in conjunction with exposure and accident.
- Medical services reasonable and necessary, medical benefits awarded.
- Not at MMI, awards prospective care recommended by treating MD.
- TTD awarded.

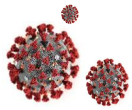


D. Case Study #3.

Arbitrator Napleton pending . . .

Facts:

- On April 10, 2020 the decedent requested vacation time.
- April 11, was the decedents last day of work before vacation.
- The decedent worked the 3rd shift.
- April 12, was a scheduled off day.
- The decedent was on vacation April 13-April 28.
- On April 28, the decedent received a positive COVID-19 test.
- On May 5, the employer received notice that the decedent was hospitalized.
- On May 11, the decedent died due to COVID.
- During the 3rd shift the decedent was not exposed to customers.
- On the 3rd shift the decedent worked with less that 15 co-workers.

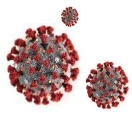


Facts: continued

- Decedent was out of his workplace for 17 days before his alleged work related death.
- The Employer was using industry specific workplace sanitation, social distancing and health and safety practices based on guidance issued by the CDC and IDPH in April, 2020.
- The decedent was on vacation for the period of April 12 – April 28, 2020.

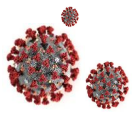
Holding:

- You Be The Judge!

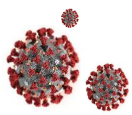


III. Other COVID-19 Resources and NBK&L COVID-19 Blogs.

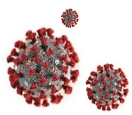
- State of Illinois COVID-19 Website
- State of Indiana COVID-19 Website
- Wisconsin Department of Public Health Services COVID:-19 Website
- NBKL Blog Posts regarding COVID-19:
- OSHA's COVID-19 Emergency Temporary Standard—Where Are We Now? by Anne-Marie Foster
- Take Two: Rebutting the COVID-19 Presumption by Christine M. Jagodzinski
- Ready for Your Halloween Scare? The First COVID-19 Presumption Case Has Been Decided in Illinois! by Amy E. Bilton
- Illinois COVID-19 Presumption of Compensability "Expires" by Joseph A. Gregorio
- The End of the COVID-19 Presumption in Illinois by Adam J. Cox



- COVID-19 Update: Benefits Extended to Essential Workers under House Bill 4276, Passed Today by Lisa Azoory-Keller
- Illinois Workers' Compensation Commission Transitions to Electronic Filing System by William A. Lowry, Jr.
- COVID-19 Update: EEOC and OSHA Issue Supplemental Reopening Guidance by Anne-Marie Foster
- Governor Pritzker Signs Bill Adding Rebuttable Presumption Subsection to the Workers' Occupational Diseases Act by Padraig McCoid
- Reopening the Workplace with COVID-19: Guidance from OSHA by Anne-Marie Foster
- Reopening the Workplace with COVID-19: Guidance from the EEOC by Anne-Marie Foster
- Illinois General Assembly Passes New COVID-19 Rebuttable Presumption Amendment to the Illinois Workers' Occupational Diseases Act by James A. Moran
- Illinois Legislature Proposes New COVID-19 Rebuttable Presumption Amendment to the Illinois Workers' Occupational Diseases Act by Nancy D. Wilensky
- ICD-10 Coding for COVID-19 and Section 111 Reporting by Rasa E. Fumagalli
- IWCC Withdraws Emergency COVID-19 Rule by Christopher J. Gibbons
- Employer Groups Obtain TRO Against IWCC Emergency Rule by Adam J. Cox



- COVID-19 Update: Emergency Paid Leave, FMLA Expansion and Workers' Compensation by Anne-Marie Foster
- Take Two: Commission Issues New Modified Emergency Covid-19 Rule for First Responders and Front-Line Workers by Christine M. Jagodzinski
- Commission Issues Temporary Emergency COVID-19 Rule Covering First Responders and "Front Line" Employees by Lisa Azoory-Keller
- Should Employers Expect Lawsuits in Circuit Court for COVID-19-Related Deaths? by David A. Victor
- COVID-19 Update: DOL and EEOC Issue Series of FAQs to Guide Employers by Anne-Marie Foster
- COVID-19 Update: FMLA Expansion and Emergency Paid Leave by Anne-Marie Foster
- COVID-19 Update: OSHA Guidance by Anne-Marie Foster
- COVID-19: Compensability, Exposure & Best Practices by Daniel R. Simones



IV. Other Seminal Workers' Compensation Cases During the Past Year.

- Kevin McAllister v. Illinois Workers' Compensation Commission 2020 IL. 124 848 (September 24, 2020)
  - Knee injury sustained while standing up from a kneeling position is an employment risk.
- Lois Vaughan v. Illinois Workers' Compensation Commission and Memorial Medical Center, 2021 IL App. (4th) 200253-u.
  -Mis-stepping on to a non-defective curb is not an employment risk.
- Leake v. Envoy Air (IWCC Decision)
  - Bed bug related itching is an employment risk for traveling employees.

McAllister - Facts

- McAllister worked as a sous-chef in a kitchen.
- Petitioner was searching for carotts in the freezer, on direction of his employer.
- While standing up from a kneeling position, petitioner felt a pop in his knee.

Three Types of Risk:

Personal Risks: No employment characteristics.

Employment Risks: Uniquely associated with the employment.

Neutral Risks: No specific employment or personal characteristics.

McAllister Appellate Court

- Is it an employment risk?
- If so, no neutral risk necessary.

McAllister Supreme Court

Standing from a Kneeling position IS an employment risk

EMPLOYMENT RISK DEFINED.....

What is an Employment Risk?

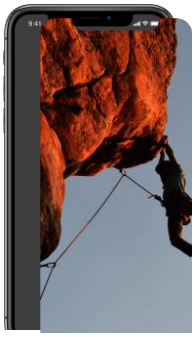
Acts the Employee was instructed to perform by the employer

Acts the Employee had a common law or statutory duty to perform

Acts the Employee might reasonably be expected to perform incident to his or her assigned duties

Vaughn v. Memorial MedicalCenter

- Petitioner, a Medical Technician, was injured tripping over a curb in a parking lot.
- No holes, defect or debris causing the trip - simple misstep for curb two inches above blacktop
- Pre-*McAllister* Decision awarded benefits due to uneven surface and slope of lot.



Vaughn v. Memorial MedicalCenter

- IWCC reverses Arbitrator's award, denying accident (11/8/2018) Appellate Court in an unpublished decision affirmed IWCC on manifest weight. Agreed that:
- Height difference was by design, not a defect No debris
- Mis-stepping over a curb not a risk peculiar to employment.

Leake v. Envoy Air

- Petitioner is flight attendant, staying in hotels chosen and paid for by her employer.
- At midnight of accident date, she awoke itching and scratching – bed bugs.
- Arbitrator awarded benefits (0% PPD)
- IWCC affirms.
- Traveling employee and bed bug exposure is reasonable and foreseeable, and frequently sharing sleeping quarters with others increases risk of bed bug infection.

THANK YOU!